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No. 92-1956

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

JAMES E. GOTTSHALL and ALAN CARLISLE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER AND PROPOSED BRIEF

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MOTION OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Product Liability Advisory Council, Inc., ("PLAC") respectfully moves, pursuant to Supreme Court Rule 37.4, for leave to file a brief as *amicus curiae* urging that this Court reverse the judgments of the United States Court of Appeals for the Third Circuit. Although counsel for petitioner has consented to the filing of the proposed brief, counsel for respondents have refused.

PLAC is a nonprofit corporation with 106 corporate members from a broad cross-section of American industry. Its corporate members include manufacturers and sellers in industries ranging from electronics to automobiles to pharmaceutical products. In addition, PLAC has

numerous sustaining members, who are leading product liability defense lawyers from across the nation. PLAC's purpose is to file *amicus curiae* briefs on behalf of its members on issues that affect the law of product liability. PLAC has submitted many such briefs in state and federal courts, including this Court.

In *Atchison, Topeka & Santa Fe Ry. Co.* v. *Buell,* 480 U.S. 557, 568 (1987), this Court observed that Federal Employers' Liability Act ("FELA") jurisprudence "gleans guidance from common-law developments." PLAC believes that the Third Circuit departed from that path. It rejected as "harsh and arbitrary" every common law standard governing claims for negligent infliction of emotional distress, *Gottshall* v. *Consolidated Rail Corp.,* 988 F.2d 355, 366 (3d Cir. 1993), in favor of "an ad hoc approach that focuses more on the facts rather than rules of law." *Id.* at 365. In so doing, the court spurned any guidance from the common law experience with claims for emotional distress. The court's unprecedented approach fails to address the concerns articulated in the common law, and applicable as well to FELA.

The fundamental theme of the common law of negligent infliction of emotional distress is that emotional distress claims are different from other tort causes of action. Although common law courts have developed a variety of standards for emotional distress claims, each standard addresses the same basic questions—how liability can be reasonably contained, how the courts can distinguish between genuine and frivolous claims, and how the law can develop rules that are easily and consistently applied. PLAC submits that the approach adopted by the Third Circuit does not deal adequately with any of these issues, to the detriment of the policies underlying FELA and the safety of the workplace.

The impact of this Court's decision, although rendered in the context of a particular federal statutory scheme, will undoubtedly extend beyond its confined circumstances. Just as FELA jurisprudence "gleans guidance" from the experience of the common law, so does the common law find instruction in this Court's pronouncements and concerns. PLAC fears that affirmance of the Third Circuit's opinions will undermine the development of the common law precisely because those opinions ignore the lessons learned through years of confronting these difficult issues. The members of PLAC, therefore, have a vital interest in urging not only that this Court reject the Third Circuit's ill-defined "ad hoc" approach to claims of negligent infliction of emotional distress, but also that it adopt a standard which acknowledges the concerns of the common law and helps bring coherence to this area of jurisprudence.

As an organization focused on tort law, PLAC offers unique expertise on common law developments with respect to emotional distress claims. Corporate members of PLAC have been party to, and sustaining members have served as counsel in, numerous civil cases involving claims of emotional distress. The participation of PLAC is particularly important not only because of the expertise it brings to this case, but also because petitioner and other *amici* do not focus on the common law in detail nor on the implications of this case beyond FELA.

For these reasons, counsel request that the Court authorize PLAC to file the annexed brief as *amicus curiae.*

Respectfully submitted,

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November 24, 1993

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Product Liability Advisory Council, Inc. ("PLAC") is a nonprofit corporation with 106 corporate members from a broad cross-section of American industry. Its corporate members include manufacturers and sellers in industries ranging from electronics to automobiles to pharmaceutical products. PLAC's purpose is to file *amicus* briefs on behalf of its members on issues that affect the law of product liability. PLAC has submitted many *amicus* briefs in state and federal courts, including this Court.

In *Atchison, Topeka & Santa Fe Ry. Co.* v. *Buell*, 480 U.S. 557, 568 (1987), this Court observed that

"FELA jurisprudence gleans guidance from common-law developments." As an organization focused on tort law, PLAC offers unique expertise on those common law developments with respect to emotional distress claims. Moreover, corporate members of PLAC have been party to numerous civil cases involving claims of emotional distress. Because common law courts may glean guidance from the pronouncements of this Court on the standards for emotional distress claims under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, PLAC has a significant interest in this case.

SUMMARY OF ARGUMENT

The court of appeals failed to follow this Court's charge in *Buell*, 480 U.S. at 568, to glean "guidance from common-law developments" in fashioning standards under FELA. Rather, it rejected all common law standards for emotional distress cases. Indeed, in *Gottshall* v. *Consolidated Rail Corp.*, 988 F.2d 355 (3d Cir. 1993), the court "refused to designate a particular common law test as *the* test in this circuit, choosing instead to take an ad hoc approach." *Id.* at 365 (emphasis in original). This nebulous "I know it when I see it" approach, *Jacobellis* v. *Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), failed to address the concerns articulated in the common law, applicable to FELA, regarding negligent infliction of emotional distress.

The fundamental theme of the common law in this area is that emotional distress claims are different from other tort causes of action. They are intangible. They are subjective. They are difficult to disprove. And they pose the risk of endless liability. Consequently, common law courts have developed a variety of standards addressing basic questions: How can liability be confined within reasonable bounds? How can the courts distinguish between genuine and frivolous claims? How can the law develop rules that are easily and consistently applied?

The Third Circuit's standardless approach resolves none of these issues.

A better approach, one consistent with policies of the common law and of FELA, would allow emotional distress claims only by persons who suffer physical impact or who are threatened with injury by the defendant's conduct, that is, those in the "zone of danger" resulting from the defendant's actions. This threshold standard winnows out trivial claims of bruised feelings or emotional upset, while allowing recovery for those persons most likely affected by a defendant's negligence. It provides an assurance of the genuineness of emotional distress claims. And it is easily administered, coinciding with the traditional focus of tort law on personal safety.

The zone of danger standard, however, is merely a threshold test. The plaintiff still must prove his or her case. This Court should provide guidelines regarding the proof required. Among the factors the court and jury should consider are whether the plaintiff's alleged emotional distress was manifested in physical symptoms and whether it was a reasonable reaction to the defendant's conduct.

This two-tiered approach distills the lessons of the common law and applies them appropriately in the context of FELA.

ARGUMENT

I. THE COURT BELOW SPURNED ANY GUIDANCE FROM THE COMMON LAW.

The court of appeals disregarded this Court's prescription in *Buell* to draw lessons from the common law. To be sure, the court dutifully surveyed common law developments. However, it then rejected all the common law standards as "harsh and arbitrary," *Gottshall*, 988 F.2d at 366, in favor of no standard at all. In the court's view, the common law had to "bow," because only an "ad hoc" approach was consistent with the policies of FELA. *Id.* at 365, 371. *See also Carlisle* v. *Consolidated Rail Corp.*, 990 F.2d 90, 98 (3d Cir. 1993) (engaging in "initial review of the factual indicia of the genuineness of a claim" without identifying such indicia).

Granted, the Court was not required to poll the lower courts to determine the most popular of the common law tests. However, it accepted none of them, declaring the common law experience inapplicable and embarking on a course that no prior decision had taken.

There is, in fact, vast experience at common law with emotional distress claims. A computer search revealed approximately 7,000 *reported* state and federal cases discussing emotional distress claims in just the last 10 years. The number of unreported cases is undoubtedly much higher.

Common law courts have struggled with disparate standards for emotional distress cases. Indeed, in *Buell*, this Court noted the "doctrinal divergences" in common law decisions involving emotional distress. 480 U.S. at 570. The divergences, however, are useful in formulating an approach under FELA. Every standard has been examined and re-examined, criticized and defended, explicated and amplified. The profusion of litigation on these issues provides a rich vein of ore from which to mine the policies that have shaped the common law.

Having undertaken that exercise, the Court can then determine how those policies apply under FELA, and what standards flow from them.

II. COMMON LAW COURTS HAVE RECOGNIZED THE NEED TO LIMIT LIABILITY FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

One fundamental precept emerges from the common law of negligent infliction of emotional distress—that emotional distress claims are different from other tort causes of action.[1] They are, unlike most claims of physical injury, ethereal, manipulable, and inextricably intertwined with the normal emotional incidents of everyday life. Those differences have affected the standards of liability at common law.

A. Courts Have Been Concerned That Liability For Emotional Distress Can Extend Without Limit.

Courts have treated emotional distress cases as unique because such claims have the potential of creating liability that is virtually limitless, in terms of both the scope of the claims and the number of potential plaintiffs. The courts have therefore imposed a minimum threshold for compensable emotional injuries, and created outer boundaries of liability delineating who is entitled to recover.

1. *Courts Have Fashioned a Minimum Threshold to Exclude Trivial Claims of Emotional Distress.*

Common law courts have made clear that tort law, unlike a railroad, is not a common carrier. Not every injury gets a ride. The law does not, and cannot, afford a remedy for every passing upset, fright, or instance of hurt feelings. In daily affairs, feelings are assaulted constantly by the careless or callous remark, the undeserved reprimand, the social slight. Most of the resulting emotional disturbances, though caused by the negligence of

[1] This case does not involve a claim of intentional infliction of emotional distress, and the standards governing such a claim are not in issue.

another, are "so temporary, so evanescent, and so relatively harmless and unimportant, that the task of compensating for [them] would unduly burden the courts and the defendants." *Restatement (Second) of Torts* § 436A cmt. b (1965).[2] Emotional distress, unlike physical injury, is simply part of daily life.

To suggest, then, as the Third Circuit did, that the key issue is "whether there was injury in fact reasonably attributable to the negligent conduct," *Gottshall*, 988 F.2d at 370, does not merely open the floodgates of litigation.[3] It interjects litigation as a looming force in social discourse. As Judge Magruder stated almost 60 years ago in assessing a proposal that any mental distress be actionable if purposely caused, "[a]doption of the suggested principle would open up a wide vista of litigation in the field of bad manners, where relatively minor annoyances had better be dealt with by instruments of social control other than the law." Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev.

[2] *Accord Champion* v. *Gray*, 478 So. 2d 17, 18 (Fla. 1985) ("[t]here must be some level of harm which one should absorb without recompense as the price he pays for living in an organized society") (quotations omitted); *Bass* v. *Nooney Co.*, 646 S.W.2d 765, 773 (Mo. 1983) (en banc) ("it is unreasonable to require that people act so carefully as to avoid occasionally angering or upsetting others, just as it is unreasonable to demand that one never accidentally jostle another in a crowd") (quotations omitted); *D'Ambra* v. *United States*, 114 R.I. 643, 653, 338 A.2d 524, 529 (1975) ("[c]ertainly the law should not compensate for every minor psychic shock incurred in the course of daily living; it should not reinforce the neurotic patterns of our society") (footnote omitted); *see also* W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 54, at 360-61 (5th ed. 1984) (hereinafter "*Prosser*").

[3] Elsewhere in its opinion, the court of appeals acknowledged the policy that "frivolous claims for trivial emotional disturbances and bruised feelings that are ordinary and expected as a part of daily life . . . are not cognizable." *Gottshall*, 988 F.2d at 380. However, the means the court prescribes for enforcing that policy—the traditional tort concepts of duty, foreseeability and causation—in no way filter out trivial claims.

1033, 1035 (1936).[4] This wide vista of litigation for intentional torts is potentially even more far-reaching for negligently inflicted emotional distress.

2. *Courts Have Set Outer Boundaries on Liability for Emotional Distress.*

The second judicial concern, regarding who may recover for emotional distress, has also shaped the law in this area. Because every individual is bound to many others in familial, social and occupational relationships, the emotional consequences of any act of negligence extend much farther than the physical consequences. Although the traditional foreseeability standard, extolled by the Third Circuit, "may set tolerable limits for most types of physical harm, it provides virtually no limit on liability for nonphysical harm." *Thing* v. *La Chusa*, 48 Cal. 3d 644, 663, 771 P.2d 814, 826 (1989). Indeed, rejecting such an open-ended standard, the California Supreme Court remarked that "there are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury." *Id.* at 668, 771 P.2d at 830.[5]

In this case, for example, if petitioner negligently caused the death of Gottshall's colleague Johns, it was arguably foreseeable that not merely Gottshall, but every other employee nearby would be distressed, perhaps seriously.

[4] *Accord Ruth* v. *Fletcher*, 237 Va. 366, 372, 377 S.E.2d 412, 415 (1989) ("[i]f everyone was allowed damages for injuries to his feelings caused by someone else, the chief business of mankind might be fighting each other in the courts").

[5] *See Asaro* v. *Cardinal Glennon Memorial Hosp.*, 799 S.W.2d 595, 598 (Mo. 1990) (en banc) ("foreseeability goes 'forward to eternity, and back to the beginning of the world' ") (quoting William L. Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 24 (1953)); *Tobin* v. *Grossman*, 24 N.Y.2d 609, 616, 249 N.E.2d 419, 422 (1969) ("[i]f foreseeability be the sole test, then . . . [recovery] would extend to older children, fathers, grandparents, relatives, or others *in loco parentis*, and even to sensitive caretakers, or even any other affected bystanders").

In addition, one could expect that all the friends and family of Johns who were not present would be subject to emotional distress. And if it was foreseeable that Gottshall would be distressed to the degree he was, then it was equally predictable that his family and friends would experience mental anguish over his suffering. The rippling effects of this injury are nearly infinite, cabined not at all by the ostensible limit of foreseeability.

In theory then, for a single act of simple negligence that causes no physical harm, a defendant could be liable for psychiatric counseling, other medical expenses, lost wages, and damages for the pure emotional distress of concentric communities of affected parties. But the issue is not just whether lawsuits will proliferate, although that prospect is serious in an era of crowded dockets and scarce judicial resources.[6] The broader concern is that without particularized rules for emotional distress claims, liability will extend too far, impose too great a burden, and be too disproportionate to the defendant's fault in a negligence case.[7]

In sum, the common law courts have striven to fashion rules unique to emotional distress claims because the traditional totems of tort jurisprudence—duty, causation and foreseeability—did not confine liability for emotional distress within practical limits. That lesson of the common law applies as well to FELA.

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[6] For example, in California, following expansion of the workers' compensation rule concerning compensation for workplace stress, the number of such claims increased approximately sixfold in six years, and may be 70,000 per year. Arthur Larson, *The Law of Workmen's Compensation* § 42.25(a), at 7-958 (1992).

[7] *See Prosser* § 54, at 366 (it would be "an entirely unreasonable burden on all human activity if the defendant who has endangered one person were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as all his friends"); *cf. Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (psychological effects on relatives of persons affected by government action too remote to include in environmental impact statement).

B. Courts Have Imposed Concrete Tests To Establish The Genuineness Of Emotional Distress Claims.

The common law also has recognized that the need to assure the genuineness of emotional distress claims requires objective limits on when such claims may be brought. This need is not, as the Third Circuit mistakenly implied, *Gottshall*, 988 F.2d at 370, the only justification for limitations on emotional distress claims, although it is an important one. Nor have considerations of authenticity centered only on the ability of courts to determine "whether there was injury in fact reasonably attributable to the negligent conduct." *Id.* The finder of fact must assess not merely the existence of mental distress, but its severity and duration as well. Each of these factors is intangible, and each is subjective. Compared to physical injuries, each is harder for doctors, and juries, to identify and measure. As even the court of appeals below recognized, "[o]ne can see frayed skin, but one cannot see frayed nerves; hence, an emotional injury is easier to fake." *Id.* at 361.

The source of concern, however, is not exclusively fakers and frauds. In the words of the Supreme Judicial Court of Massachusetts:

> A plaintiff may be genuinely, though wrongly, convinced that a defendant's negligence has caused her to suffer emotional distress. . . . It is in recognition of the tricks that the human mind can play upon itself, as much as of the deception that people are capable of perpetrating upon one another, that we continue to rely upon traditional indicia of harm to provide objective evidence that a plaintiff actually has suffered emotional distress.

Payton v. *Abbott Labs*, 386 Mass. 540, 547, 437 N.E.2d 171, 175 (1982). For example, some persons have a

psychological need to blame external factors for their feelings of anxiety or depression.[8] A person's subjective belief that he or she has been psychologically harmed thus does not establish the existence of compensable emotional distress, much less its severity, duration, or relation to the alleged negligence. In other words, in a process requiring no objective corroboration of any claimed mental disturbance, the hypochondriac prevails. He is injured to the extent he thinks he is.

The inquiry on each of these issues is further complicated because the process of litigation itself may exacerbate an emotional disturbance or impede recovery. *See Stoleson* v. *United States,* 708 F.2d 1217, 1222 (7th Cir. 1983) ("awarding damages for hypochondria too freely might aggravate those symptoms and thus make litigation itself a source of illness"); Gary B. Melton et al., *Psychological Evaluations for the Courts* 283 (1987); Singer, 1 Am. J. Forensic Psych. at 10.[9] In cases involving fear of disease, for example—an increasingly common form of emotional distress litigation—counsel representing the plaintiff often needs to portray the feared event in the most dire terms and to overstate, or at least to emphasize,

[8] Barton A. Singer, *Psychological and Forensic Considerations in the Treatment of Post-Traumatic Stress Disorder,* 1 Am. J. Forensic Psych. 3, 5-6 (1983); *see* Douglas B. Marlowe, *Negligent Infliction of Emotional Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress,* 33 Vill. L. Rev. 781, 818 (1988).

[9] Additionally, psychiatry recognizes that the propsect of litigation provides incentives to feign, imagine, or exaggerate a mental disturbance. The DSM-III-R, the basic text of psychiatric diagnosis, specifically notes that one of the circumstances creating a strong suspicion of such malingering is the "medicolegal context of presentation," that is, the pendency of a lawsuit. American Psychiatric Association, *Diagnostic & Statistical Manual of Mental Disorders* § V65.20 (3d ed. rev. 1987).

the likelihood of its occurrence. Such rhetoric can engender or amplify the very fears at issue in the suit.

The Third Circuit dismisses concerns about genuineness by counselling "active scrutiny of the facts," *Gottshall,* 988 F.2d at 371, and breezily predicts that "the court and the jury, drawing upon their combined human experiences in the course of a trial, will distinguish between victims and fakes." *Id.* at 373. But, as noted, the tripartite inquiry regarding the existence, severity, and duration of emotional distress is not so simple. Indeed, in contrast with the complacency below, many courts have questioned their own ability to authenticate or to calibrate the mental distress allegedly attributable to defendants' conduct.[10]

The assertion that progress in medical science vitiates judicial concerns about genuineness is rebutted by the prevalence of those misgivings to this day. Moreover, medical progress in fact has not simplified this inquiry. As this Court noted in a recent term, "[t]he subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations." *Medina* v. *California,* 112 S. Ct. 2572, 2580 (1992) (quotations omitted). Even psychiatrists do not believe they are as capable as the court below thinks it is in weeding out meritless claims of emotional distress. There are several reasons for their hesitancy. First, psychiatric diagnoses in this area are often difficult and unreliable.[11] Moreover,

[10] *E.g., Meracle* v. *Children's Service Soc'y,* 149 Wis. 2d 19, 28-29, 437 N.W.2d 532, 535-36 (1989); *Keck* v. *Jackson,* 122 Ariz. 114, 115, 593 P.2d 668, 669 (1979). Even this Court, in assessing the need to consider psychological effects in environmental impact statements, worried that, "[i]t would be extraordinarily difficult for agencies to differentiate between 'genuine' claims of psychological health damage and claims that are grounded solely in disagreement with a democratically adopted policy." *Metropolitan Edison Co.* v. *People Against Nuclear Energy,* 460 U.S. 766, 778 (1983).

[11] *See Medina,* 112 S. Ct. at 2580 ("[p]sychiatric diagnosis . . . is to a large extent based on medical 'impressions' drawn from

factors external to medical practice often enter the evaluation. For example, there is a high correlation between the diagnostic and prognostic decisions of mental health experts and whether they work for plaintiffs or defendants.[12] Whatever the explanation for this correlation, it underscores the need for objective factors to confirm the genuineness of emotional distress claims.

That courts deal frequently with intangible claims for pain and suffering attendant to physical injury also is not a persuasive reason for greater latitude regarding emotional distress claims. First, with respect to pain and suffering, there is at least a physical injury providing objective verification of the genuineness of the claim. Furthermore, litigation involving pain and suffering is no model of juridical success. Approximately 23 states

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subjective analysis and filtered through the experience of the diagnostician") (quotation omitted); Stephen T. Perconte & Anthony J. Goreczny, *Failure to Detect Fabricated Posttraumatic Stress Disorder with the Use of the MMPI in a Clinical Population*, 147 Am. J. Psych. 1057, 1059-60 (1990) (failure of standard psychometric test); Landy Sparr & Loren D. Pankratz, *Factitious Posttraumatic Stress Disorder*, 140 Am. J. Psych. 1016, 1016 (1983) (reporting case studies and noting that the symptoms of posttraumatic stress disorders "are mostly subjective" and "can be easily simulated"); Nathan T. Sidley, *Proximate Cause and Traumatic Neurosis*, 11 Bull. Am. Acad. Psych. Law 197, 198 (1983) ("[i]n psychiatry and the field of causation of neurosis, the state of science is primitive; in the field of traumatic neurosis, it probably will always be primitive because of some basic difficulties"); American Psychiatric Association, *Quick Reference to the Diagnostic Criteria From DSM-III-R* 113-18, 146-48, 194-95 (1987) (psychiatric diagnoses require significant interpretation and subjective weighing of multiple simultaneous criteria).

[12] Jesse Simon & Jack Zusman, *The Effect of Contextual Factors on Psychiatrists' Perception of Illness: A Case Study*, 24 J. Health & Soc. Behav. 186 (1983); *see Stoleson* v. *United States*, 708 F.2d 1217, 1222 (7th Cir. 1983) (advising healthy skepticism toward emotional distress claims because "there is not much difficulty in finding a medical expert witness to testify to virtually any theory of medical causation short of the fantastic").

have enacted ceilings on damages for pain and suffering, reflecting significant dissatisfaction with the amount and unpredictability of such awards. *See* Randall R. Bovbjerg, *Legislation on Medical Malpractice: Further Developments and a Preliminary Report Card*, 22 U.C. Davis L. Rev. 499, 543 (1989).[13]

That so many courts have been so concerned for so long about genuineness in emotional distress cases is strong evidence that such claims are indeed different, that the factual inquiry they require is extraordinarily difficult. This Court should take heed of the longstanding and oft-stated warnings about the need for safeguards against unfounded claims of emotional distress.

C. Common Law Courts Have Adopted Bright-Line Rules To Gauge The Validity Of Emotional Distress Claims.

As noted, the Third Circuit "refused to designate a particular common law test as *the* test in this circuit, choosing instead to take an ad hoc approach." *Gottshall*, 988 F.2d at 365 (emphasis in original). With all due respect, this approach abdicates judicial responsibility. Absent some test of the validity of emotional distress claims that is more informative than the court of appeals' "gestalt," injured parties, tortfeasors, insurers, and their counsel have no way short of litigation to determine in any case whether there is a compensable claim for emotional distress. *See Thing*, 48 Cal. 3d at 655, 771 P.2d at 821 (criticizing prior California decisions because litigants "had no means short of suit" to determine whether a claim was actionable). "I know it when I see it" is no better standard for torts than for obscenity. *See Jacobellis* v. *Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

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[13] That a number of state courts have declared these damage caps unconstitutional in no way undermines the point that commentators, legislatures and courts have perceived a need for reform in this area.

As discussed above, *see* pp. 5-8, *supra*, virtually every court addressing claims for emotional distress has recognized that some limitation is essential. Otherwise, every trivial emotional slight could be litigable. Every person who learned of an injury to a friend would be a potential plaintiff. If not every instance of emotional upset or hurt feelings occasioned by the negligence of another is compensable, then some standard must identify which claims are cognizable and which are not. So long as a rule is necessary, the "societal benefits of certainty in the law, as well as traditional concepts of tort law," *Thing*, 48 Cal. 3d at 655, 771 P.2d at 815, dictate that it be clear and verifiable. *See Quill Corp.* v. *North Dakota*, 112 S. Ct. 1904, 1914-15 (1992) (bright line rules are particularly important when the law in the area "is something of a quagmire") (quotation omitted).

To illustrate, some courts have adopted only the vague threshold standard that emotional distress be "serious" or "severe" in order to ground liability.[14] But as one court has observed:

> Severity is not an either/or proposition; it is rather a matter of degree. Thus, any attempt to formulate a general rule would almost inevitably result in a threshold requirement of severity so high that only a handful would meet it, or so low that it would be an ineffective screen. A middle-ground rule would be doomed, for it would call upon courts to distinguish between large numbers of cases factually too similar to warrant different treatment.

Boyles v. *Kerr*, 855 S.W.2d 593, 600 (Tex. 1993) (quoting Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477. 511 (1982)). Phrases open to widely differing interpretations, such as "serious" or "reasonable," thus will fail to limit liability or reliably distinguish genuine claims.

[14] *E.g.*, *Sell* v. *Mary Lanning Memorial Hosp. Ass'n*, 243 Neb. 266, 271, 498 N.W.2d 522, 525 (1993).

It may well be that courts and juries frequently determine "negligence," and that what constitutes "negligence" is not much clearer than what constitutes "seriousness." However, as Justice Scalia has pointed out, at least "the class of plaintiffs seeking to recover for negligence is limited to those who have suffered harm." *Harris* v. *Forklift Sys., Inc.*, 62 U.S.L.W. 4004, 4006 (Nov. 9, 1993) (Scalia, J., concurring). By comparison, there is no such limit for claims of emotional distress, where the central issue is whether the plaintiff has suffered genuine harm. Furthermore, that negligence standards may be vague and ambiguous is no reason to compound the problem by obscuring the thresholds of liability for unavoidably intangible and subjective claims.[15]

Not only do vague standards fail to resolve the problems that have moved the courts to limit liability for emotional distress, they also unnecessarily extend litigation. A vague standard invites disputes of material fact, and thus reduces the possibility of eliminating meritless claims on summary judgment.[16] For example, experts may submit contradictory affidavits on whether the plaintiff's dis-

[15] As Oliver Wendell Holmes stated in describing the common law, "[i]f in the whole department of unintentional wrongs the courts arrived at no further utterance than the question of negligence, and left every case, without rudder or compass, to the jury, they would simply confess their inability to state a very large part of the law which they required the defendant to know, and would assert, by implication, that nothing could be learned by experience." Oliver Wendell Holmes, *The Common Law* 111-12 (1881).

[16] *See Knake* v. *King*, 492 N.W.2d 416, 417 (Iowa 1992); *Gordon* v. *Alaska Pac. Bancorporation*, 753 P.2d 721, 725 (Alaska 1988). *See generally* Richard A. Posner, *Economic Analysis of Law*, 543-44 (1992) (discussing costs of vague standards including inefficiency due to having to apply the standard in every case, and lack of deterrence).

tress is "serious" because the elasticity of the concept permits each to harbor a different view of what constitutes "serious" distress.

These concerns have led common law courts to fashion clear, though differing, rules in cases involving claims of emotional distress. Many courts, for example, have insisted on physical injury, the threat of physical injury, or physical manifestations of mental disturbance as a prerequisite to recovery. In another type of emotional distress case, involving alleged fear that an implanted medical device might fail, courts have insisted on concrete proof that the plaintiff's own device was defective.[17] In cases based on fear of disease, they have imposed a well-defined threshold requirement of proof that the plaintiff was actually exposed to the disease.[18]

The lesson of these cases is that the Court must draw some line, and faced with that obligation, it ought to draw a clear one.

III. THE COURT SHOULD ALLOW EMOTIONAL DISTRESS CLAIMS ONLY BY PERSONS INJURED OR THREATENED WITH INJURY BY THE DEFENDANT'S CONDUCT.

As this court recognized in Buell, the common law provides a menu of standards from which this Court can "glean[] guidance." 480 U.S. at 568-70. The Court should draw on the lower courts' experience with varying rules and adapt those standards to the context of FELA.

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[17] *E.g.*, *Walus* v. *Pfizer, Inc.*, 812 F. Supp. 41, 45 (D.N.J. 1993); *Spuhl* v. *Shiley, Inc.*, 795 S.W.2d 573, 580-81 (Mo. Ct. App. 1990).

[18] *Hare* v. *State*, 570 N.Y.S.2d 125, 127, *appeal denied*, 78 N.Y.2d 859, 580 N.E.2d 1058 (1991); *Burk* v. *Sage Prods., Inc.*, 747 F. Supp. 285, 287 (E.D. Pa. 1990).

A. The Zone Of Danger Rule Fulfills The Policies Of FELA And Of The Common Law.

The policies that emerge from a century of tort jurisprudence apply fully to FELA cases. Under FELA, as at common law, the Court must screen out trivial or evanescent episodes of emotional distress and place meaningful boundaries on potentially expansive vistas of liability. Under FELA, as at common law, the Court must erect adequate safeguards against meritless claims, because emotional injuries in either context are hard to measure, easy to exaggerate, and difficult to disprove. And under FELA, as at common law, the Court must afford clear direction to lower courts and litigants regarding when claims for emotional distress will be recognized. To do otherwise is to leave the law in disarray, to foment unnecessary litigation, and to ensure the need for further review by this Court in the future.

Indeed, the policies of the common law assume added importance in FELA cases. In negligence actions, the plaintiff typically must prove breach of a duty to the plaintiff, injury, and causation. Under FELA, the plaintiff's burden is much lighter. In particular, FELA has severely restricted causation as a way of cabining liability. *See H.W. Mitchell* v. *Missouri-Kansas-Texas R.R.*, 786 S.W.2d 659, 661 (Tex.), *cert. denied*, 498 U.S. 896 (1990) (holding that "common law proximate cause plays no part in determining liability in a FELA case and requiring proof of it is reversible error"), *Gallick* v. *Baltimore & Ohio R.R.*, 372 U.S. 108, 116-17 (1963).

Because of the plaintiff's reduced burden under FELA and the potentially limitless nature of emotional distress claims, the Court must shun expansive or vague rules of liability or duty lest employers become insurers of the psychological well-being of their employees. *See Inman* v. *Baltimore & Ohio R.R.*, 361 U.S. 138, 140 (1959). Petitioner Conrail urges that the Court recognize only those claims of emotional distress arising from actual or

threatened physical impact on the plaintiff. PLAC supports this standard. It is well-developed in the common law courts, as it is the prevailing view in many jurisdictions. *See* Appendix to Petitioner's Brief (listing jurisdictions). It is easily applied. And it builds upon the experience of the common law while advancing the purposes of FELA.

Tort law functions most reliably when performing those inquiries which it was designed to undertake and which it pursues regularly. The primary focus of tort law, as well as FELA, is personal safety. *See Wilkerson* v. *McCarthy*, 336 U.S. 53, 68 (1949) (Douglas, J., concurring). Courts in both contexts are experienced in examining the physical harm resulting from the defendant's conduct, or the threat to health and safety that it posed. Petitioner's proposed standard, which focuses on actual or potential harm to personal safety—on whether the plaintiff was in the "zone of danger" created by the defendant's conduct—thus comports with the thrust of tort jurisprudence. *See* Pearson, 34 U. Fla. L. Rev. at 515-16. Because the law has already addressed so many of the situations involving threats of physical harm, the legal system can readily accommodate this standard.

Applying this test under FELA would further the common law policies discussed above. First, because the zone of danger test focuses on justifiable fear, it winnows out petty claims of bruised feelings or emotional upset.[19] Second, the test provides an assurance of genuineness—an objectively verifiable factual scenario which could be ex-

[19] *Rickey* v. *Chicago Transit Auth.*, 98 Ill.2d 546, 554-55, 457 N.E.2d 1, 4-5 (1983) (zone of danger rule would not encourage "frivolous litigation"). Moreover, by recognizing that a near miss may be as frightening as an actual impact, this standard also alleviates the harshness that led some courts applying the pure physical impact rule to trivialize that requirement. *See, e.g., M.B.M. Co.* v. *Counce*, 268 Ark. 269, 278-81, 596 S.W.2d 681, 686-88 (1980); *Zelinsky* v. *Chimics*, 196 Pa. Super. 312, 318, 175 A.2d 351, 354 (1961).

pected to produce serious emotional distress.[20] And, third, it is clear, brightly marking the boundaries of liability.

Perhaps most importantly, the zone of danger approach delineates some reasonable outer limits on liability while allowing recovery for those plaintiffs most likely to be affected. By defining the class of potential plaintiffs as those who were themselves at risk of harm, the rule avoids the impossible task of distinguishing among bystanders and others—*e.g.*, fathers, mothers, grandparents, siblings, those who saw the accident contemporaneously, those who did not, those who heard the accident, and those who heard of it—to determine who might foreseeably suffer emotional distress. By identifying the compensable harm as fear for one's own safety, the rule advances the goals of FELA. To allow recovery merely for witnessing an unpleasant sight, for example, would tie damages to factors unrelated to workplace safety, such as how many observers were present, the clarity of their view, and their proximity to the event. As the Fifth Circuit observed in *Gaston* v. *Flowers Transportation*,

> Because they are irrelevant to that operation, visiting exponential damages on an employer on the basis of such factors is not only random and wayward, but serves in no way to advance the major subsidiary purpose of affording such remedies as those of the FELA/Jones Act to trainmen and seamen: to hold out incentives to their employers to reduce dangers and to operate safely.

866 F.2d 816, 820 (5th Cir. 1989). As the zone of danger test is so closely linked to personal safety, it would

[20] *See Stadler* v. *Cross*, 295 N.W.2d 552, 554 (Minn. 1980) (reaffirming zone of danger rule because "courts and juries can objectively determine whether plaintiffs were within the zone of danger . . . [and] plaintiffs can be cross-examined regarding whether their fear was for themselves or for another"). *Cf. Prosser* § 54, at 364 ("[t]he true value of the impact requirement may lie in the opportunity which is afforded to the defendant to testify that there was in fact no impact").

encourage appropriate behavior and efficient use of limited resources.[21]

The major criticism of the zone of danger rule is that it is arbitrary. *Gottshall*, 988 F.2d at 361. Individuals inches outside the zone of danger, it is contended, may suffer as much emotional distress as the person inside the zone, yet those outside cannot recover. However, the only alternatives to the zone of danger approach are to impose no limit on liability besides foreseeability, to create other distinctions, or to adopt the Third Circuit's ad hoc approach. None improves upon the zone of danger rule.

To allow liability to flow unchecked to the farthest reaches of foreseeability is, as observed above, unwise and destructive. ***See*** pp. 5-8, ***supra***. To fashion other limitations merely draws different and, if anything, less defensible distinctions among potential plaintiffs. Thus, for example, courts attempting to venture beyond the zone of danger in allowing bystanders to recover have become entangled in a web of inconsistencies. The mother who saw her child hit by a car could recover. *Dillon* v. *Legg*, 68 Cal. 2d 728, 441 P.2d 912 (1968). The mother who saw her children only an instant later, bloodied and dying, could not. *Parsons* v. *Superior Court*, 81 Cal. App. 3d 506, 512 (1978). A husband present at his wife's death was able to sue, *Krouse* v. *Graham*, 19 Cal. 3d 59, 76-77, 562 P.2d 1022, 1031 (1977), but an unmarried man could not recover for viewing the death of his long-time cohabitant. *Elden* v. *Sheldon*, 46 Cal. 3d 267, 277, 758 P.2d 582, 588 (1988).

The problem with these distinctions is that the courts have recognized a compensable harm—distress regarding

[21] The Court should be aware that in other contexts, such as fear of disease litigation, different or additional threshold standards may be appropriate. *See, e.g., Rabb* v. *Orkin Exterminating Co.*, 677 F. Supp. 424, 428 (D.S.C. 1987) (plaintiff must prove feared future medical condition is "reasonably certain" to occur); *O'Brien* v. *Medtronic, Inc.*, 149 Wis. 2d 615, 621-22, 439 N.W.2d 151, 153-54, *review denied*, 446 N.W.2d 286 (Wis. 1989) (plaintiff must prove device is defective or has malfunctioned).

an injury to another person—and then artificially limited recovery in a manner unrelated to the existence or severity of that harm. The zone of danger rule, by contrast, is consistent. It allows as a compensable injury a well-founded fear for one's own personal safety, and it imposes no artificial barriers to recovery for that fear.[22] It is not arbitrary to limit liability to serve policies other than compensating persons allegedly subjected to mental distress, so long as the limitations consistently and fairly effectuate those goals.[23] The zone of danger rule does so. The alternatives do not.

The Third Circuit's approach of abandoning any standard and relying solely upon a "review of the factual indicia of the genuineness of a claim," *Carlisle*, 990 F.2d at 98, imports its own brand of arbitrariness. If limits "cannot be consistently and meaningfully applied by courts and juries, then the imposition of liability would become arbitrary and capricious. Consequently, the cause of just apportionment of the losses would suffer." *Stadler*, 295 N.W.2d at 554; *see D'Ambra* v. *United States*, 114 R.I. 643, 650, 338 A.2d 524, 527-28 (1975) (noting that "jury determination of potential liability, unfettered except by some vague concept such as foreseeability, would rapidly lead to exceedingly uneven parameters of liability").

[22] However, this Court need not decide here whether it wishes to carve out specific exceptions to the zone of danger rule for individuals closely related to an injured worker, *e.g.*, parents, who suffer mental distress because of those injuries and not because of fear for their own safety. The issue is not presented in this case, nor is it likely to arise frequently in FELA litigation. *See Gottshall*, 988 F.2d at 372.

[23] If the test of arbitrariness were whether a rule bars recovery by a person injured through the negligence of another, then many boundaries in the law of torts would qualify. Statutes of limitation, contributory negligence, and sovereign immunity all deny relief to injured parties. The reason these are not arbitrary is that they serve policies other than compensation of plaintiffs.

In sum, the common law rule recognizing only those claims of emotional distress arising from actual or threatened physical impact on the plaintiff serves the policies of FELA. This standard allows recovery for justifiable fear while providing clear boundaries of liability and guarantees of genuineness.

B. This Court Should Provide Guidance Regarding The Factual Inquiry That Must Occur After The Zone Of Danger Test Is Met.

The zone of danger test is not the end of a trial court's inquiry. It is the beginning. It provides reassurance regarding the genuineness of emotional distress claims, but not an ironclad guarantee. It delimits who may *not* recover, but does not establish the plaintiff's entitlement to damages. It affords some reason to believe the emotional distress is serious, but no more than reason to believe. It is, as advertised, a threshold test.

Once the plaintiff clears this threshold, he or she still has to prove the case. The finder of fact—be it judge or jury—still must determine whether the claim of emotional distress is serious, authentic, and tied to the negligence of the defendant. While the inquiry, like any factual review, must be flexible, this Court should provide guideposts.

Specifically, even one in the zone of danger created by the defendant's conduct ought not to recover for trifling or fleeting distress, but rather only for serious or severe distress. Recognizing the vagueness of this factor—which disqualifies it as a threshold test—many courts have gauged the seriousness of emotional distress by whether the plaintiff has exhibited physical symptoms attributable to the mental disturbance.[24] As the Supreme Court of

[24] *See, e.g., Muchow* v. *Lindblad*, 435 N.W.2d 918, 921-22 (N.D. 1989) (insomnia and weight loss were "transitory and inconsequential" and therefore not the requisite "bodily harm"); *Corso* v. *Merrill*, 119 N.H. 647, 652-53, 406 A.2d 300, 304 (1979) (physical symptoms guarantee "that the emotional injury is sufficiently serious to be afforded legal protection"); *Restatement (Second) of Torts* § 436A cmt. b (1965) (noting "emotional disturbance which is not so severe and serious as to have physical consequences is normally in the realm of the trivial, and so falls within the maxim that the law does not concern itself with trifles").

New Hampshire phrased this standard, the plaintiff must allege and prove that she suffered physical harm as a result of the conduct which caused the emotional distress. *Thorpe* v. *State Dept. of Corrections*, 133 N.H. 299, 303-04, 575 A.2d 351, 353-54 (1990). Further, the harm "must be susceptible to some form of objective medical determination and proved through qualified medical witnesses." *Id.* at 303, 575 A.2d at 353 (quoting *Corso* v. *Merrill*, 119 N.H. 647, 653, 406 A.2d 300, 304 (1979)).

Physical manifestation of injuries is thus useful in distinguishing serious from insubstantial emotional distress. It also provides additional assurance that the claim is genuine.[25] That the physical manifestation requirement is overinclusive—that it might let through its screen some claims of emotional distress which in fact are not genuine or serious—suggests only that it is best used as urged here, as one factor in a flexible factual analysis undertaken *after* the threshold standard has been met. The contention that the physical manifestation criterion is underinclusive—that it may exclude legitimate claims of emotional distress which happen not to be accompanied by any physical symptoms—has been asserted, but not proved. As the *Restatement* notes, physical consequences are a hallmark of serious harm to psychological health.

[25] Claims of mental anguish unaccompanied by physical injuries "are more often assumed than real—and the suit too liable to be wholly speculative." *Ruth* v. *Fletcher*, 237 Va. 366, 372, 377 S.E.2d 412, 415 (1989). The Supreme Court of Rhode Island, despite recognizing advancements in the field of psychiatry, reaffirmed its requirement of physical symptomatology on this basis: "because of the nature of the illness it is too difficult to substantiate absent objective physical symptomatology." *Reilly* v. *United States*, 547 A.2d 894, 897 (R.I. 1988).

Restatement (Second) of Torts § 436A cmt. b. In any event, as noted, this measure is not proposed as a rigid precondition of recovery, but rather as an evidentiary guidepost in a detailed factual inquiry. It is sufficiently linked to the policies of the common law and of FELA to serve that function well.

The court in its factual inquiry should also consider whether the plaintiff has suffered the degree of distress that a reasonable person, normally constituted, would experience in reaction to the negligent conduct in issue. Common-law courts have generally rejected the "eggshell skull" rule in claims of emotional distress.[26] In other words, contrary to the practice with respect to physical injuries, the defendant does not take the plaintiff as she finds him. As Prosser states, the standard "is an objective one, which excludes liability for hypersensitive mental disturbance." *Prosser* § 54, at 365 n.60.

The rationales for this approach are compelling. First, without an objective standard by which to measure liability and damages in an emotional distress case, the judge and jury would be at sea. Once the zone of danger test was satisfied, the plaintiff's distress, for all practical purposes, would be whatever he said it was, and the court would have little basis to second-guess. Second, the rea-

[26] *See, e.g., Sullivan* v. *Boston Gas Co.*, 414 Mass. 129, 132, 139-40, 605 N.E.2d 805, 807, 811 (1993); *Sell*, 243 Neb. at 271, 498 N.W.2d at 522; *Shuamber* v. *Henderson*, 579 N.E.2d 452, 456 (Ind. 1991); *Thing*, 48 Cal. 3d at 667-68, 771 P.2d at 829-30.

In emotional distress cases under FELA, courts have also rejected the eggshell skull rule. *See Plaisance* v. *Texaco, Inc.*, 966 F.2d 166, 168-69 (5th Cir.) (en banc) *cert. denied*, 113 S. Ct. 604 (1992) (where experienced seaman would not have suffered such an emotional reaction, plaintiff seaman's injuries were not reasonably foreseeable); *Teague* v. *National R.R. Passenger Corp.*, 708 F. Supp. 1344, 1350 (D. Mass. 1989) (requiring that "reasonable person would have suffered emotional distress under the circumstances of the case"). *But see Pierce* v. *Southern Pac. Transp. Co.*, 823 F.2d 1366, 1372 n.2 (9th Cir. 1987) (seeing "no principled reason why the eggshell plaintiff doctrine should not apply").

sonable person limitation also keeps damages in proportion with culpability.[27] The zone of danger standard does not necessarily perform this function. It is, as noted, a threshold standard. Third, imposing liability for the anomalous or bizarre emotional reaction would not make the workplace safer.[28]

Particularly under FELA, where the proximate cause requirement is attenuated, the Court should be wary of compensating plaintiffs for idiosyncratic reactions. In *Gottshall*, for example, posttraumatic stress syndrome is not a normal reaction to the death of a friend.[29] In *Carlisle*, a nervous breakdown is not a reasonable reaction to workplace stress.

Once again, this reasonable person standard is one factor for the judge and jury to consider in determining whether the plaintiff has proved the case. But it is an important factor. It is difficult to imagine when it would be proper for a plaintiff to recover for an unreasonable fear or a preposterous emotional reaction. On the other hand, standing alone, the reasonable person standard by itself is too tied to specific facts, too vague and too shorn

[27] For example, courts have denied recovery in the following cases: *Ford* v. *Aldi, Inc.*, 832 S.W.2d 1 (Mo. App. 1992) (vomiting for more than 36 hours upon finding insect in food); *Howard* v. *Mt. Sinai Hosp., Inc.*, 63 Wis. 2d 515, 217 N.W.2d 383, *reh'g denied*, 63 Wis. 2d 515, 219 N.W.2d 576 (1974) (per curiam) (fear of developing cancer due to broken catheter); *Caputzal* v. *Lindsay Co.*, 48 N.J. 69, 222 A.2d 513 (1966) (heart attack at sight of brownish water from faucet).

[28] Thus, for example, in the related context of Title VII, where the goal is a workplace free of discrimination, the statute forbids conduct creating an "environment that *a reasonable person* would find hostile or abusive." *Harris*, 62 U.S.L.W. at 4005 (emphasis supplied).

[29] *Cf. Meracle* v. *Children's Service Soc'y*, 149 Wis. 2d 19, 30, 437 N.W.2d 532, 536 (1989) ("distress that is usually experienced by close relatives when illness strikes a family member is normal and is not compensable").

of objective content to serve as a threshold test of liability. It is a guidepost, and the courts should use it as such.

CONCLUSION

The judgments of the court of appeals are out of step with the policies of the common law and of FELA. They should therefore be reversed.

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